Notre Dame Law Review

Volume 27 | Issue 4 Article 3

8-1-1952

Some Reflections on the Natural Law

Anton-Hermann Chroust

SOME REFLECTIONS ON THE NATURAL LAW†

Natural Law is the realization of a momentous possibility: the possibility that what is highest in the province of legal and moral thought is also deepest in nature. It is the realization of the possibility that the ideal and the existentially real can be identified in one single concept of justice, not merely évanescently in our lives or personal experiences, but enduringly in the universe itself. From a thorough investigation of this possibility no seriously minded student of the law should be debarred, no matter what his personal philosophy may be.

In order to gain a true perspective of Natural Law and its problems, it would profit us to rid our minds temporarily of all preconceived notions regarding the historically developed and accrued positive law. Many lawyers and jurists, engrossed in the technicalities of their profession, might wonder how we could achieve a first hand acquaintance with Natural Law, unless it be by reference to history and historical texts. For did not the great Windscheid only two generations ago announce in a final intonation that "at last we have been shaken rather rudely out of a dream called natural law." *(Der Traum des Naturrechts ist ausgeträumt.)*

We, the heirs of a positivistic or realistic law tradition, steeped in the technical and historical aspects of the so-called case method, can no longer look to real legal authority. We have been told by Julius Stone [1] that even the slender traditional authority of the common law, the "jurisprudence of stare decisis," is at best but a wishful thought. Our learned judges, speaking from the highest tribunal, are bluntly informing us that their decisions are valid for one day and that

† This paper originally was delivered on the occasion of the first Archbishop Ireland Memorial Lectures on Natural Law, November 28-30, 1950, held at the College of St. Thomas, St. Paul, Minnesota.

1 Stone, *Fallacies of the Logical Form in English Law,* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 696 (Sayre ed. 1947).

day only. How, then, can we resort to authority, if we are brought up on what might be called an anti-authoritarian experimental jurisprudence, already degenerated into a purely experimental "method of social engineering." In a blaze of pragmatic fervor the advocates of this social experimentation admit that if there is at all such a strange thing as law and justice, it is at best a crude hit or miss affair, imperfectly attainable through the mechanical balancing of equities. We might even use reason as an instrument to find out something about the law. But, again, we have been told by philosophers now in fashion that reason is an instrument to be used most sparingly and only as a means of clarifying what comes to us by experience — what has been done in the name of law. And experience — the positive law — itself has become a tenuous word which today is more elusive than ever.

It is suggested here that above all we should render the term law in a broader and more profound sense than the professional legal positivist or legal realist would ever concede. It is further intimated that the term "legal knowledge" should be interpreted to include a type of understanding which to some extent is actually outside the rather narrow limits drawn by the unimaginative legal positivist or legal realist without thereby becoming "illegal" or irrational. In other words: we shall attempt here to indicate that Natural Law is a form of eminently valid legal knowledge or knowledge situation; that like all other forms of valid knowledge, Natural Law consists of critical judgments organized in a coherent body of "super-sensorial data"; and that these judgments are based on reason and fact as well as the rational awareness of the existence of values, standards, or norms. We shall also show that the knowledge situation which stands for Natural Law is tantamount to the apprehension of self-evident propositions as well as their rationally cogent implications; and that Natural Law is above all not

so much the establishment of a particular and limited legal datum or description of such an isolated datum, but rather the fuller realization of *all* positive legal data and their ultimate over-all significance.

It is the purpose of this paper to suggest that Natural Law is a form of legal knowledge which cannot be restricted, by a positivistic legal empiricist, to judgments confirmed by what courts, legislators or administrative agencies actually do or have done in a given situation. Natural Law implies a knowledge which includes a systematic understanding of metaphysics and reason properly employed, as well as an appreciation of certain objective standards, principles and norms which contain the possibility for a more profound evaluation of the totality of all positive laws. And finally, Natural Law also signifies a type of rational knowledge which includes an interpretation of the whole world of human action and human conduct on the basis of these objective standards, principles and norms.

Although Natural Law at times lacks the detailedness and particularization of the positive law, like every form of truly rational knowledge, it presupposes a participation in fundamental relationships which are reasonable and hence both universal and necessary. In addition, knowledge of Natural Law stands for what I would call a basic "loyalty" to something eminently rational in the domain of human conduct and human relations. It is loyalty to the power that works the realization of this rational conduct and thus brings about these relationships. Hence Natural Law is also a body of convictions as well as rational conclusions declaratory of the appropriateness of certain intelligent and voluntarist commitments. Such commitments, to be sure, in their eminence cannot always be verified empirically, particularly not by those legal positivists or legal realists who insist on limiting the meaning of the law to whatever is done officially by the courts, the legislators, or

the administrative agencies of every politically organized society. But even the most radical legal positivist or legal realist cannot really deny that Natural Law, which he probably would call "a belief," leads to a kind of assurance which cannot be considered more arbitrary than the positivistic position itself.

With Dean Pound we shall define positive law as the historically developed and accrued body of basic grounds of, and guides to, actual decision in controversies. These grounds and guides are not merely directives for actual decisions; they are also guides to a definite conduct as well as the basis for the prediction of possible "official" action. This body is, at the same time, a highly specialized instrument of social control within an existing organized and politically developed society. As a matter of fact, this society operates and carries on much of its business in accordance with this body of basic materials which are applied in a judicial or administrative process. Both the administrative and judicial process, in turn, are nothing other than the application and development of these basic materials through the employment of a definite technique. And this technique itself, like the body of basic materials, must be understood in the light of historical evolution, taught tradition and certain received socio-political ideals which are likewise fundamental.

Natural Law, on the other hand, signifies a well grounded rational understanding of a basic situation, expressed in rational judgments. It means, at the same time, the intelligent recognition of certain authoritative and objective norms, standards and precepts of conduct. In this, Natural Law might even be called a devotion to perfection and to the power which is at the bottom of this perfection. And this devotion cannot be otherwise than the expression of an intelligent attitude devoid of arbitrariness and sentimentality. Natural Law, or the knowledge which is called Nat-

ural Law, makes definite assertions about values, standards and relations; as well as about the totality of a given reality called the existing positive law. But this existing reality — the positive law — which is a purely experimental situation, also claims to be true — a claim which must still be submitted to the approved tests of truth. Obviously, the positive law cannot test itself as regards this particular claim. Such an attempt would lead to utter confusion, anarchy and even lawlessness. For what sincere legal positivist or legal realist could really tell us which of two decisions is "the correct one," and which is "the false one?" And still he is somehow aware that one of these two decisions is "the correct one" or at least the one he "likes better," unless he would concede, in a spirit of cynical resignation, that "correct" is whatever the last and hence technically unimpeachable court of appeals has said in its latest decision. But such a dispirited surrender to mere "legal do-ism," such a degrading "give-it-all-up philosophy" cannot satisfy and never has satisfied the more ambitious mind. Hence only a "higher law," the Natural Law, affirmed and reaffirmed by the loftiest thinkers of all times, can actually decide the validity of the truth claim made by positive law.

During the 18th and the early part of the 19th century, judicial review, for instance, had nothing to do with the positive law or a written constitution. On the basis of common right and reason it operated in a relationship of semi-independence of the written law. Thus Justice Samuel Chase, in *Calder v. Bull,* stated in 1798: [2]

> I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute and without control. . . . There are certain vital principles . . . which will determine and overrule an apparent and flagrant abuse of legislative power. . . . The genius, the nature, and the spirit, of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid

2 3 Dall. 386, 1 L. Ed. 648, 649 (U.S. 1789).

> them. [To hold otherwise, it was concluded,] would be political heresy altogether inadmissible. . . .

And Justice Miller, in *Citizens' Savings and Loan Association v. Topeka City*,[3] decided in 1874, pointed out quite emphatically that "it must be conceded that there are . . . rights in every free government beyond the control of the State. A government which recognized no such rights . . . is after all but a despotism."

We all agree that there is a basic difference between the mere liking of a thing and the goodness of a thing. To assert that something is good, is a definite truth claim. It implies that objective knowledge about goodness is possible. Now such an affirmation is in itself significant because it implies the recognition of something — objective standards, norms, or principles — which is independent of individual preferences, likings, or desires. To assert the existence and validity of objective standards, norms, or principles is not, as some positivists would make us believe, the discovery of how individuals feel personally about certain matters. It is, on the contrary, the discovery and assertion of something above these experiences of personal emotions; something which conforms to reason and the dispassionate process of intelligent argument.

The innumerable revolutions of history show that at all times men of excellence have resorted to a "higher law" when they rejected most eloquently a legal system which could no longer be justified by this "higher law." In doing this they actually appealed to a higher standard of justice and right, and to a more perfect and lasting norm of what constitutes true lawfulness. We might also recall here the truly great philosophers who have held this truth to be self-evident: that above the bewildering multitude and diversity of the ever-changing positive law there must exist a higher unchanging law which in its objectivity is co-eternal with

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3 20 Wall. 655, 22 L. Ed. 455, 461 (U.S. 1874).

absolute truth. And the existence of this higher law is of crucial importance for man himself. For only in virtue of this higher law, but never through all the decisions of courts, acts of legislature, or commands of administrative agencies, can the true secular excellence of individual man become manifest and effective. Only through this higher law — the Natural Law — can the real uniqueness of man's inalienable and irreducible moral worth and dignity be practically asserted. We might even say that only through the Natural Law can man's claim to rationality be fully justified and hence become of real practical significance. The real advantage of this eternal truth is that, although it seems to become extinguished at times, in the course of the ages there have been, and always will be, thinkers of excellence to assert and re-assert it, until some day its proclamation falls in a time when under more favorable circumstances this truth escapes persecution and ridicule. For basic truth such as this will, in God's good time, make sufficient headway to withstand all subsequent attempts to suppress it.

Some opponents of the Natural Law might point out here that it has not theoretical truth as its primary object, at least not according to their pragmatic conception of truth. As a matter of fact, the positivist or realist will point out rather emphatically that Natural Law is not at all concerned with the discovery of truth — that it has not the detached impartiality which is considered, by the so-called scientific realist, positivist, or semanticist, an indispensable part of the truthseeker's attitude. But what does the scientific realist actually mean by truth, that is to say, by his particular concept of truth? Truth to him is contained in the following rather meaningless formula: Any assertion which is not an assertion of fact is not a true assertion; any assertion of fact which is not based on sense experience is not a true assertion of fact; any sense experience which

cannot be verified by scientific experiment is not a true sense experience; and any scientific experiment which does not lend itself to quantitative measurement is not a true scientific experiment. But what does all this mean for the problem of law? Let me suggest here the following answer: In the light of such a naturalistic view, and in keeping with the now so prominent faith in "scientific realism," psychologism, or plain statistical method, the truth meaning of law would be reduced to a quantitative analysis of glandular secretions, appetitive droolings, and reflex, random, or artificial (learned) responses to stimuli. Somehow I feel rather happy over the fact that the truth situation connected with the problem of Natural Law does not meet the truth requirements demanded by the positivist or scientific realist.

But even from the rather limited point of view of the legal realist, Natural Law is a truth method, although essentially an indirect truth method. Let us, for argument's sake, temporarily assume the position of the legal realist looking at Natural Law. If, then, the methods of Natural Law, according to the legal realist or legal positivist, are so indirect, and if its participation in the truth situation is incidental to its other aims, is Natural Law not rather poorly equipped for an adequate comprehension of the practical legal truth situation? Our answer to this query fundamentally seems to depend on whether or not we are willing to concede that the methods with which we seek truth are so complex and often so different from one another that different forms of approach to truth at times become necessary. As a matter of fact, we shall base our whole argument in favor of Natural Law on the assumption that the approach to the truth situation called Natural Law requires a different method than a purely realistic treatment of the law, commonly referred to as "legal scientism." And in doing this we shall make every possible concession to the legal realist and legal positivist.

If we agree with the positivistic or realistic approach to law and its many problems, we are forced to admit that the legal truth situation in general must be defined as a body of "beliefs" confirmed by sense data and quantitative experiments. If this is really so, then we are unable to make any truth claims for Natural Law whatsoever. If, on the other hand, we are willing to concede that there exists a type of truth situation which we affirm even though its complete verification by sense data, sense observation and quantitative experimentation is beyond our reach, then a less restricted and hence more fruitful approach to the problem of the legal truth situation in particular can be established. Perhaps the most eloquent defense of this broader view on the legal truth situation is stated by William James himself, certainly a man whom even the most radical legal realist and legal positivist cannot completely ignore. In a letter addressed to Professor Leuba, James makes the following statement: [4]

> I find it preposterous to suppose that if there be a feeling of unseen reality shared by large numbers of best men in their best moments, responded to by other men in their "deep" moments, good to live by, strength-giving, — I find it preposterous, I say, to suppose that the goodness of that feeling for living purposes should be held to carry no objective significance, and especially preposterous if it combines harmoniously with our otherwise grounded philosophy of objective truth.

Whenever we are dealing competently with a type of knowledge such as Natural Law, we are apt to tread on perilous ground. It appears that the perils of Natural Law arise from several sources. One peril stems from a shocking misunderstanding or misconception of Natural Law. Another proceeds from the unwillingness of some men to face its demands whenever these demands are opposed to their prejudices, traditions, interests, or aspirations. These men, at least outwardly, "accept" Natural Law by professing to

4 2 PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 350 (1935).

be its supporters. But actually, in the application of its principles to social problems, they succeed in undermining it in the eyes of its adherents and the sceptical. A third peril to Natural Law arises from the failure to re-apply the principles of Natural Law to changing conditions and changing needs. This peril becomes particularly serious in times of crisis or rapid socio-economic change. We may, for instance, falsely identify Natural Law with an established economic or social system or, on the other hand, we may be so convinced of the desirability of a new economic order that we are inclined to abandon the principles of Natural Law altogether in order to bring about this new social or economic system. We may even be so misguided about the meaning of Natural Law that we claim thereby to be setting up a new and allegedly superior kind of Natural Law.

Hence there seem to be five major difficulties with Natural Law which we have inherited from the past or which we have often experienced from the manner in which this problem has been treated by certain so-called experts on the Natural Law. The first difficulty is caused by a misunderstanding which proceeds from the methods applied by some of the defenders of Natural Law. This particular defense overlooks four important factors. First, it is made in behalf of all manner of conflicting notions not only as to what constitutes Natural Law itself, but also to what constitutes "nature." Obviously, not all these notions can be true, as a mere cursory survey of the different definitions of Natural Law in the history of Western thought will at once divulge. This confusion about the meaning of Natural Law becomes increasingly serious if no satisfactory means of judging and evaluating all these conflicting definitions as to their real truth content can be devised. The mere feeling of personal "psychological certitude" or "psychological assurance" cannot be accepted as a valid truth criterion by anyone. Secondly, the rather crude but frequently encountered efforts to

identify Natural Law exclusively with property rights at the expense of human rights at times have actually turned Natural Law into the handmaid of unrestrained greed and economic domination. Thirdly, there is always a glaring incongruity between the notion of a Natural Law which gives special favors to one while at the same time denying to others the prerequisites of a minimum of decent human existence, and the notion of the universal validity of the Natural Law advanced by the devotees or authors of such a "preferential Natural Law." Fourthly, the manner in which this type of "preferential Natural Law" is woven into the general fabric of legal ideas and the concept of a natural, that is, universal justice approved by ordinary standards and arising from common and healthy experiences, has never been satisfactorily explained.

The second difficulty about Natural Law arises from the frequently reiterated claim that some men possess what I would call a mystical experience of Natural Law — an immediate and personal conviction which supposedly reveals to some select people the "mystery of Natural Law." In essence this particular attitude towards Natural Law is merely another form of "special revelation" frequently claimed by such clairvoyants as Hitler or Stalin.

The third difficulty about Natural Law seems to be related to the question as to how the principles of Natural Law could be applied to an existing, that is to say, historically developed socio-economic situation. This acute and perhaps even crucial problem is often disposed of in a most perfunctory, not to say callous and irresponsible manner. The historical complexities of the many economic, social and moral issues of total human existence thus remain wholly unrelated to the Natural Law principles professed. Such an attitude toward Natural Law is clearly one of shallow generalizations bordering on meaningless and platitudinous equivocations.

The fourth difficulty comes from an uncritical definition of Natural Law, coined and employed by people, both in the present and in the past, who have tried to manipulate Natural Law and its meaning in order to advance selfish interests or to defend on an allegedly supernatural basis what nature and natural reason itself has unmasked as being indefensible. In their hands it has become a more or less systematic effort to justify strange practices of somewhat objectionable men trying to use and abuse the loftiest aspirations of mankind for their own crude purposes. By its very motives and results this type of alleged Natural Law stands condemned in the eyes of all intelligent and decent men.

The fifth and perhaps most serious difficulty must be recognized in the fact that Natural Law has been invoked, though falsely, by certain questionable experts on the Natural Law in order to justify, and even glory in, their anti-intellectual, anti-progressive and anti-humanitarian bias. This irresponsible and immoral polity, parading under the name of Natural Law, has done almost irreparable damage to the cause of Natural Law. It has, in many instances, alienated from the Natural Law many people of excellence who, under more favorable circumstances, would have become its most persuasive adherents and spokesmen. Deeply disappointed with this type of "pseudo-Natural-Law," many a good legal scholar has either become an avowed opponent of the Natural Law, or has embraced some form of positive law which in his opinion would treat more adequately the pressing social, economic, or political issues of our time.

Not a few people, among them scholars as well as plain dilettantes, seem to be ready to take Natural Law for granted. They often go so far as to regard it as something self-explanatory or even self-evident. There are indeed those who sing its praises, as there are those who denounce it. But unfortunately there are only a very few who genuinely

study and properly interpret it. Whenever we think that Natural Law, being something self-explanatory or self-evident, needs no competent explanation or special understanding, we are particularly apt to misunderstand or falsify it completely, as the many and often distressing instances of platitudinous generalizations and equivocations about Natural Law would indicate. It is truly deplorable that this thing called Natural Law frequently is not deemed to need or deserve the patiently painstaking and faithful exercise of the intelligence we apply to so many other things that matter to us much less. Here as elsewhere we fail to see the importance of things we simply, or should I say, naively take for granted without further thought or effort. But this alleged familiarity with Natural Law, which is actually nothing other than complete ignorance or, at best, a grossly inadequate or distorted knowledge of the meaning inherent in the concept of Natural Law, may in fact breed misunderstanding and even contempt.

When we fail to realize the meaning and importance of Natural Law we actually forsake both our heritage and our future. The need for an intelligent and forceful comprehension of the Natural Law is greatly intensified by the problems of our own time. There are strong challenges from without, and there is also legal and moral disintegration within. There are forces at large which, to meet successfully, we need a strong and clear cut reassertion of the true principles of Natural Law, a solemn revindication of its worth, and a firm reapplication of its values. We may, as we have in the past, spring to the defense of Natural Law when it is manifestly threatened; and we have a vague inkling what the loss of Natural Law would mean to us. But this sentimental attachment to Natural Law does not suffice for its survival or salvation. What we need is a positive reassertion of Natural Law. But in doing so we cannot cling to antique expressions, outmoded conceptions, or outworn phrases of

the past. Many advocates of the Natural Law make the serious if not fatal mistake of limiting both its meaning and content to thunderous and often ill-advised tirades against legal positivism, legal pragmatism and legal realism. Such a purely negative attitude, being totally devoid of any constructive or positive element, neither is apt to make friends for the Natural Law, nor does it clarify what Natural Law actually means and for what it stands.

The only way we can bring to life Natural Law is to translate it anew into the language and institutions of our time. All values die sooner or later if in a spirit of misplaced reverence for the past we cling to the formulas of other days. Hence we must gain a clear conception of the positive nature of Natural Law, its worth and value. In our time in particular, when Natural Law is subjected to new and formidable challenges, we run great risks because of our lack of understanding of what Natural Law actually means. Since the advocates of legal positivism always take advantage of our compliance and our ignorance of Natural Law, a thorough understanding of the positive content of Natural Law should be of particular concern to us.

In a general way the legal positivist and legal realist did start out with the rather ambitious but never realized claim that they would establish once and for all the scientific foundation of legal truth. Putting the emphasis on certainty and clarity of the law and the positivist legal truth situation at the expense of its range, they have gradually and progressively restricted the area to which the term "law" and legal knowledge can be applied. No one, to be sure, will quarrel with a procedure which, if applied to a limited field of human understanding and human inquiry, assists us in distinguishing what from the standpoint of purely experimental knowledge is clearly known, and what is less clearly known. But this method certainly goes too far when, as a by-product of this procedure, the domain of the less clearly

known — less clearly known according to the truth criteria of the positivist and realist — suddenly becomes the unknowable or not-known, or as in the case of metaphysics and Natural Law, the "non-sensical." Such practices are frequently not so much the result of willful design as the effects of an uncritical abuse of the positivistic or realistic knowledge processes. Issues and problems which at best are but dimly perceived by the positivist or realist, and which do not lend themselves to quantitative analysis or statistical experimentation, are thus banished in a rather arbitrary manner from the area of the total truth situation and simply declared the equivalent of matters which are not known at all.

A generation of lawyers and jurists, many of them undoubtedly prompted by the most honorable motives, have looked to legal positivism and legal realism for a scientific solution to the many complex questions posed by the law. They expected and, indeed, hoped that scientific legal realism would offer some intelligent solution to the many vexing problems connected with the law. But they were sorely disappointed: For the only answer which legal positivism and legal realism can offer to the problem of law is in fact the denial of the significance of the problem itself. What the legal positivist or legal realist can actually supply is nothing other than a factual description or recitation of decisions, statutes, procedural rules, or perhaps congressional debates in terms of naive observations or manipulations. Such a descriptive method has met with full approval by the physical scientist who, after all, should be permitted to determine his own methods and procedures as long as he remains within the restricted area of his own scientific province. But what might be fully adequate for the purely experimental physical sciences could be, and probably is, somewhat inadequate for the solution or understanding of the many problems arising from the practically significant

conduct of man. For we might ask here the question whether this kind of simplicity in the province of knowledge proposed by the physical scientist is not won at the dire expense of adequacy in our treatment of the problem of knowledge in general. If we follow their advice we might gain one method or procedure of dealing with purely physical or sensate facts, but at the same time we lose every chance of expanding the domain of truth and the area of the knowable. Because in doing this we refuse at the very outset to admit the possibility of such an extension beyond mere sensate experience and experiment.

At this point we should also inquire whether the positivistic or realistic position itself is not confronted with serious difficulties of its own. Let me enumerate some of these inherent difficulties: The legal positivist or legal realist must assume without proof the accessibility of the past through memory; the communication or communicability of ideas, concepts, or symbols through identical meaning; the consonance of other experiences with his own; the acceptability of his own hypothetical purpose; the dependability of induction; and the validity of his insight into logical relations as well as into the connection between initial hypothesis and final verification. All these postulates, on which he bases his whole method, his procedures, and hence his whole claim to truth are nothing but "gratuitous dogmas." The exclusive reliance on actual pronouncements of the courts or acts of administrative agencies, proposed by the legal positivist or legal realist, in itself always implies and presupposes, therefore, the assumption of, and reliance on, something more than these actual pronouncements or acts. And finally, we should also point out that by his exclusive reliance on these actual pronouncements or acts, he is forced to assume the existence of other minds — an assumption which he himself cannot verify satisfactorily by his own scientific method. But he must nevertheless make this unscientific and, as a matter

of fact, totally unwarranted assumption — unwarranted from his own point of view — in order to justify his own use of intersubjective language and symbols. This alone would indicate most glaringly that the legal positivist or legal realist has already been forced into a strictly defensive position, unable to carry out his much advertised and loudly heralded attacks on Natural Law.

It is a common practice of the legal positivist or legal realist to challenge his opponent by inviting him to deal with the problem of law in a more adequate manner than he does. And we can accept this challenge with confidence. For is it not his practice always to assume or presuppose certain "unscientific" beliefs which, in the final analysis, are necessary to his own method and hence always turn out well for him? Thus we might point out to him that all these assumptions actually do not belong within the province of verifiable sense-experiences and hence are actually outside the particular truth situation or knowledge situation which he so jealously tries to establish and defend. This fact alone, if pointed out properly, in itself should destroy his position. Let me illustrate this point. The legal positivist or legal realist will openly scoff at such "bed-time stories" as the "moral dignity of man" or the "natural rights of man." But from experience we know that in practice there is hardly a more eloquent claimant of these rights than the legal positivist who spends most of his time disproving "scientifically" the very existence or truth of these rights. Since Natural Law frequently fulfills the latent purposes even of those individuals who rebel against it theoretically, it seems to provide also for those who are totally blind to its existence. Paraphrasing Proudhon and his famous statement we can say with much assuredness about the positivistic or realistic approach to law: *"Qu'est ce que le droit positif? Le droit positif c' est le vol.* (What is this thing called positive law? Nothing other than plain theft.)

Thus the issue between the legal positivist and those who still adhere to Natural Law would seem to be not mere juristic experience against a super-experimental understanding of the law, but actually juristic experience plus something more than this experience against super-experimental understanding of the law. Hence the question which confronts us as well as every honest legal positivist or legal realist is plainly this: What does this "something other than pure experience" consist of, and what does it actually include? This raises at once a further question: Are the data of positive law in fact purely "positive," that is, purely empirical? Does the legal positivist or legal realist, in order to establish his particular legal truth situation or legal knowledge situation, rely exclusively on empirical data — the functions of the courts, legislators, or administrative agencies? Is it not true that in an experimental science such as physics there arise different kinds of problems with varying degrees of remoteness from pure sense data and the procedures of the laboratory? For does not physics frequently proceed systematically rather than experimentally? In other words: Physics, although it is of course not wholly independent of sense observation and measurements, requires more than mere observation and quantitative experiment. As a science, that is, as a body of organized knowledge about a subject, it requires at all times systematization and organization. But systematization and organization, like method or procedure, are in themselves not prima facie sense data based solely on experience. All this suggests in itself that we should try to strengthen our notion of knowledge in general by acknowledging an abstract truth situation, instead of allowing it to be weakened and ultimately refuted by relying simply on one single procedure which is extremely meager at that.

The intelligent person, it seems, is and always has been rather suspicious of those efforts to establish truth which

limit themselves to mere sense perception and sense data. He has consistently denied the existence of a purely experimental truth situation or knowledge situation. At the same time, in one way or another, he emphatically denies that all metaphysical assertions are meaningless. He insists that, if certain assertions made by positivistic philosophers are provisionally accepted as true, then we should also investigate the assertions made by non-positivist philosophers. Such a request is only a fair one, unless we are already agreed upon not to display any impartiality whatsoever.

The metaphysician who insists that Natural Law is preeminently a definite legal truth situation, is able to show the more profound meaning of the many and at times confusingly complex legal facts. He can also tell us what the presuppositions are which enable us to deal with these facts in an intelligent manner. He can show us how Natural Law is the intelligent and systematic study of the inner structure of all these legal facts. Although by no means blind to facts and their relevance, Natural Law is not so much concerned with facts as with the ultimate meaning of these facts with a view on justice. And justice, according to Giorgio Del Vecchio, is one of the fundamental needs of the human mind.[5] All this does not mean, however, that Natural Law, if properly understood, will ignore or discriminate against the present status of social, sociological or legal theories concerning the derivation and validation of certain ethico-practical judgments or facts. Neither will Natural Law depreciate an empirical explanation of the multifarious experiences that comprise legal controversy, legal adjudication and law-making. Hence when it is said that Natural Law is not so much concerned with facts as with the ultimate meaning of these facts, we are merely attempting to indicate that Natural Law sees in every legal, social, or moral fact also something which, although it seems to escape the legal

5 DEL VECCHIO, THE FORMAL BASES OF LAW 14-5 (Lisle's transl. 1914).

positivist and legal realist, not only enhances greatly the meaning of this fact, but actually establishes in a certain sense the authenticity of this fact. For is it not true that in the domain of practical actuality the *significance* of a certain datum for a practical situation is really more important than the mere empirico-factual actuality of this datum as such?

The whole controversy of legal positivism or legal realism and Natural Law, therefore, can be reduced to the following question: Are we actually improving the total knowledge situation or truth situation by following the positivist position in refusing to permit the term knowledge or truth to be applied to insights which are the result of analysis or clarification of a body of given facts? Is it not true that the legal positivist or legal realist already treads on metaphysical ground when he maintains that the legal truth situation must be restricted exclusively to whatever the courts, legislators or administrative agencies do?

Natural Law, on the other hand, is more than a mere refutation of a purely positivistic or realistic treatment of the law. By implication Natural Law claims that there is a truth about certain norms, standards, or values which can be known and which, if properly understood, is true knowledge. It involves the recognition of certain values and standards which are the foundation of all just laws as well as the ultimate determinatives of the positive law and our experience of the positive law. In addition, it is also a more profound interpretation of the practical or legal universe in terms of its effective influence on this universe. The legal knowledge situation, which we shall call Natural Law, actually involves two kinds of what I would like to call interpretations: First, a general and perhaps emotional experience of value and meaning must be made the object of critical judgments until it becomes a truly critical and hence intelligent or rational statement. Such a transformation of

an unreflective experience into a reflective judgment, of course, involves the application not only of the formal principle of consistency, but also the reliance on certain rational standards which have been tested by the rules of reason and hence can be accepted by all rational beings. Secondly, these standards are held to be real and are taken as having true practical efficacy.

Obviously, such an intelligent attitude constitutes the real knowledge situation or truth situation commonly called Natural Law. And the worst we can possibly say about this knowledge situation is that the evidence which justifies its acceptance by far outweighs the negative evidence. This knowledge situation has as its data objective principles rather than mere sense data or emotional outbursts. Natural Law and the knowledge situation for which it stands claim truth for the judicious assertion that the world as a whole, no less than our total legal experience, furnishes actual support not only for the experience, but also for the existence of absolute values and objective standards. In this, Natural Law contributes decisively to the translation of mere hopes or dreams into the actual realization of what is good, true and just. It is also declaratory of an eminently decent and intelligent attitude which continuously asserts that the standards of right and wrong, good and evil are objectively real and as such are truly effective in the lives of men. At the same time, it claims that true, clear and rational statements can be made about these objective and real standards, and that rational conclusions can be drawn from them. Finally, it implies that any legal knowledge situation which fails to take account of these standards and their practical effectiveness, is incomplete and, as such, no true legal knowledge situation at all.

Natural Law, by its very nature, reflects the true dignity of individual man as a person. By giving expression to human nature and, hence, to the elementary human interests and aspirations, it endows man with active as well as passive

rights which, being consonant with man's nature and ordination, are inalienable. Man is endowed with the power to assert himself within proper limits and to work out his own happiness, both secular and eternal. But these active powers or rights of every human individual do not presume his independence of other individuals. They do not permit him to conduct his affairs without concern for the affairs of others and without regard for the effects his actions may have upon other men.

Natural Law, by succeeding to make man aware of fundamental rights, assures him a moral equality in the exercise of these rights. Under the Natural Law one man's rights are other men's obligations; and one man's obligations are other men's rights. Hence no man can claim rights the exercise of which is demonstrably injurious to another man. And no man has a right of exploitation. For Natural Law, properly understood, will never condone man's inhumanity to man. It does not merely establish the liberties and rights of *individual* man, but also the liberties, rights and obligations of *social* man. It sustains man's claims as a person. It affirms his quality as a human being. At the same time, being consonant with the social nature of man, it confronts man with serious social obligations. Hence Natural Law is not merely a body of rights, often loosely referred to as the "liberties of the individual." Such a generalization is both thoughtless and dangerous in that it connotes "rights in detachment," that is, rights apart from the human community and rights unrelated or even antagonistic to the common good and the common welfare. It is dangerous in that it conceives of the individual as existing in a social vacuum. It is thoughtless in that it completely ignores the question, so basic to Natural Law, of how far one's liberty or one's right can co-exist or conflict with other liberties and rights; and how far certain liberties or rights of some individual may be adverse to certain liberties and rights cherished by others, or even to the elementary needs of life

itself. For Natural Law, being declaratory of a practical order, is by its very nature the great and eternal restraint imposed on all men by virtue of their humanity. Because of the failure to perceive this, a gross and often vulgar individualism has frequently paraded itself as Natural Law or natural rights. There exists, however, an alarming confusion concerning the relation of Natural Law and human equality, a confusion which is but an aspect of the even more serious confusion concerning the inter-relation of Natural Law, the common good and individualism.

Natural Law, by assuring all men of certain fundamental rights, also assures them of a moral equality in the exercise of these rights. Now it is claimed that men cannot exercise their natural rights effectively unless they are equal in all other aspects as well. This claim is justified to a degree, and then only if the problem of limitations is clearly understood. For beyond certain limits equality and liberty may become opposed to one another in that the passion for equality can destroy liberty. Any attempt to achieve absolute equality would most surely result in regimentation or totalitarianism in one form or another.

The kind of equality which is most clearly in harmony with Natural Law is the equality of opportunity in order that all men may develop their natural gifts and talents for their own advantage and the service of the common good. This equality of opportunity, proclaimed by the Natural Law, is based on the realization that man has his irreplaceable worth and his irrepressive dignity. By conferring as well as declaring the equal dignity of all men, it actually combines opportunity with dignity — the opportunity to realize one's own moral nature and thus live in accord with one's own moral dignity. By the same token, it requires the removal of all those insidious inequalities which frustrate the fulfillments men are capable of — inequalities which arise from the unequal hazards of life,

from privilege, and from historically evolved tyrannies of man over man, and group over group.

The real issue, therefore, is whether we should not abandon the rather narrow and, hence, misleading notion that law exists only on the level of a restrictive experience of tangible legal events and positive actions by the appropriate organs of existing society. Quaintly enough, we all seem to agree, some on a rational, some on a sentimental or emotional basis, that certain legal truths or legal values are of universal validity, irrespective of whether they are put into effect or complied with by the courts, legislators, or administrative agencies. These ultimate legal values, which serve as objective standards, norms and precepts of human conduct, both individual and social, are the eternal greatness of the law manifest in the passage of temporal laws.

Natural Law as such does not merely indicate where new legal facts can be discovered, but frequently it also discloses these facts to the inquiring mind. On certain occasions it strikes vigorously and decisively into the world of positive law, for instance when the dignity of man and the deep significance of democracy is shown to be an essential element of a social situation. Natural Law, in addition, signifies a growth not only in the knowledge of the law, but also in the understanding of the ultimate meaning of the law. Hence the significant relation of Natural Law and positive law may perhaps be defined as follows: The closer a legal situation is to the essential aspects of human existence, the clearer becomes the evidence of Natural Law. It is here that we encounter the basic guarantees of life, liberty, freedom to engage in a lawful calling, and freedom to pursue our happiness. But the more contingencies are involved in a definite legal situation, the greater will be its positive legal determination through the proper agencies of existing society. Natural Law, in addition, signifies a growth not only in the knowledge of the positive law, but also in the understanding of the ultimate meaning of all positive laws.

To heed the call of Natural Law is to find out more about the Natural Law. And in doing so we shall achieve a more profound understanding of what Natural Law means as a moral force throughout the world. The result of such a response to the call of Natural Law can frequently be observed in the general deportment of those who have made Natural Law an essential part of their lives.

The knowledge of Natural Law simply implies the intelligent acceptance of certain absolute and objective standards for conduct and thought. In addition, it involves an interpretation and understanding of law and justice in terms of the existence and power of these standards. Hence we might suggest that the term knowledge used in this connection, should be applied to that type of commitment which is typical of all intelligent men whenever they hold that there must be something comfortingly true, good and stable about the law, above mere sentiment, opinion and the bewildering conduct of courts, administrative agencies, or ambitious scholars. Natural Law and the legal knowledge situation which Natural Law involves, calls upon the highest intellectual considerations in the domain of law and justice. As such it never over-reaches the intellect, but merely points out a realm of intelligent reflections where the ultimate significance of law and justice is eternally domiciled.

Natural Law, then, is truly the acceptance of a momentous possibility — the possibility that what is highest in the province of legal or moral thought is also deepest in nature. And from the acceptance of this possibility we should not be debarred.

*Anton-Hermann Chroust**

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* Associate Professor of Law, University of Notre Dame, J.U.D., 1929, University of Erlangen; Ph.D., 1931, University of Munich; S.J.D., 1933, Harvard Law School. Professor of Institutional History in the Graduate School; Lecturer, Medieval Institute, University of Notre Dame. Member, Medieval Academy of America; Committee on Jurisprudence of the Association of American Law Schools. Honorary Corresponding Member, *Instituto de Filosofia Juridica y Social* of Argentina. Author of various articles in legal and philosophical journals.